In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 381

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO), PETITIONER

v.

WAGNER IRON WORKS

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This memorandum is filed on behalf of the National Labor Relations Board in response to the cross-petition in the above-entitled case.

The circumstances giving rise to the cross-petition and the question presented therein are as follows:

Upon charges filed by the cross-petitioner, hereafter called the CIO, the Board on April 23, 1953, issued its Decision and Order requiring the Wagner Iron Works, hereafter called the Company, to remedy certain unfair labor practices. More specifically, the Board found that the Company had dis-

criminatorily discharged 64 striking employees, and rejected the Company's defense that these employees had forfeited their statutory protection because the strike was in breach of a no-strike commitment and in vioaltion of Section 8(d) of the Act. The Board further found that the Company had discharged 22 night shift employees to discourage CIO union activity, and rejected the Company's contention that they had been discharged for cause. Accordingly, the Board directed the Company to reinstate all of these employees.

In proceedings to enforce the Board's order, the court below affirmed all of the Board's findings except those relating to the night shift employees. With respect to the latter, the court held that "the Board did not sustain the burden of proving that these discharges were discriminatory" since the "record does not disclose the union affiliation or leanings of any of the discharged employees" and "does not support the essential finding that the Company knew of the CIO membership or leanings, real or presumed, of the discharged employees."

On June 28, 1955, the Company filed a petition for a writ of certiorari to review the lower court's judgment insofar as it enforced the Board's order. No. 185, this Term. That petition presents three questions set forth below.[1] In response thereto the

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[1] 1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act (which bars from the remedial processes of the Act employees who strike during

Board filed its memorandum stating that it did not oppose certiorari with respect to questions numbered one and two, because they were also presented in *Mastro Plastics Corp.* v. *National Labor Relations Board,* No. 19, this Term, in which this Court has granted certiorari, 348 U. S. 910.

The CIO's cross-petition seeks review of that portion of the lower court's judgment which denied enforcement of the Board's order with respect to the 22 night shift employees. Although the Board agrees that the court below erred in this respect, the Board did not seek certiorari because of this Court's usual practice not to review questions relating to the substantiality of evidence supporting Board findings. For that reason and for the further reason that the question affecting these employees was unrelated to, and severable from, the questions presented in the Company's petition, the Board did not cross-petition for certiorari to review the judgment relating to the night shift employees.

If this Court grants the Company's petition for certiorari and, in the circumstances, deems it appropriate to review the judgment of the court

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the "cooling-off" period preceding termination of a collective bargaining contract) applies to "unfair labor practice" strikers who strike during the "cooling-off" period.

2. Whether employees discharged for breaching a covenant in their collective bargaining contract prohibiting "any strike," by striking during the term of the contract, may be ordered reinstated by the National Labor Relations Board.

3. Whether the National Labor Relations Board may order reinstatement of strikers whose contract of employment provided that the contract grievance and arbitration procedure *"shall be the sole means of disposing of grievances."*

below with respect to the night shift employees, the Board will join the CIO in urging reversal of that portion of the judgment.[2]

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

OCTOBER, 1955.

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[2] There may be some question as to the standing of the CIO to cross-petition for a writ of certiorari. The facts relating to this point may be summarized as follows: The Board in its Decision and Order dismissed the complaint against the Company insofar as it alleged the unlawful discharges of ten other employees. After the Board petitioned the court below for enforcement of the portion of its order which sustained the complaint, the CIO petitioned that court to review that part of the order dismissing the complaint in part. The Board subsequently moved the court below to consolidate the two proceedings "for all purposes" on the ground that such consolidation "would conserve the court's time as well as the time of the parties by enabling the Board to consolidate into a single brief" the two briefs which it would otherwise be required to file, and "would materially reduce the printing expenses by enabling the Board to file a single consolidated appendix." The court below ordered the two causes to be consolidated "for all purposes."

It is not clear from this order whether the court below intended to consolidate the causes merely for purposes of filing consolidated briefs and appendices, or whether the order had the additional purpose of making the CIO a party to the enforcement proceeding brought by the Board. If the order is interpreted as having the effect of making the CIO such a party, its standing to petition for certiorari is clear. Cf. *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-339.

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